

**BEFORE THE
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION**

In the Matter of:

**BIG FOOT TRANSPORTATION, INC.,
DBA SPEEDWAY**

Respondent.

**Docket No. FMCSA-2007-27601¹
(Midwestern Service Center)**

ORDER GRANTING MOTION TO VACATE PAYMENT DUE NOTICE

1. *Background*

This matter comes before the Federal Motor Carrier Safety Administration (FMCSA) on a Motion to Vacate Payment Due Notice and Request for Expedited Consideration submitted by Big Foot Transportation, Inc., dba Speedway (Respondent) on February 16, 2007.

On January 19, 2006, the FMCSA's Nebraska Division Administrator issued a Notice of Claim (NOC) charging Respondent with 23 violations of 49 CFR 395.8(e) (false reports of records of duty status) and proposing a civil penalty of \$10,810 (\$470 per violation).² In April 2006, Respondent and the Field Administrator for the FMCSA's Midwestern Service Center executed a Settlement Agreement resolving the matters raised by the NOC.³ Pursuant to Section 5 of the Agreement, Respondent agreed to pay 65% of the proposed civil penalty with the remaining 35% suspended on the condition that

¹ The prior case number was NE-2006-0019-US0835.

² Attachment 2 to Respondent's Motion to Vacate Payment Due Notice.

³ Attachment 3 to Respondent's Motion to Vacate Payment Due Notice.

Respondent will “not receive any critical or acute violations in Part 395 during any compliance review within the two (2) year period from the execution of this Agreement by the Field Administrator”. Pursuant to Section 6 of the Agreement, the suspended amount would be permanently forgiven upon full compliance with the terms of the Agreement.

On December 20, 2006, FMCSA’s Nebraska Division conducted a compliance review of Respondent. This compliance review found, among other things, 50 violations of § 395.8(e).⁴ On January 3, 2007, the Field Administrator demanded immediate payment of the suspended amount (\$3,783) on the grounds that Respondent violated Section 5 of the Settlement Agreement.⁵

In its Motion to Vacate the Payment Due Notice, Respondent argued that the Notice was issued prematurely because the findings of the December 2006 compliance review were merely allegations that had not yet been adjudicated. According to Respondent, a settlement agreement is, under its own terms, a Final Order, and violations of Final Orders must be adjudicated in accordance with 49 CFR 386.82 in order for the Field Administrator to collect additional civil penalties. Such adjudication requires issuance of an NOC pursuant to § 386.11(c). According to Respondent, the Field Administrator’s payment due notice does not contain the required elements of an NOC and is not the proper vehicle for asserting a claim for additional civil penalties.

The Field Administrator responded to Respondent’s motion on March 28, 2007, arguing that: (1) the findings of the December 2006 compliance review “unequivocally

⁴ Exhibit C to Field Administrator’s Response to Motion to Vacate Payment Due Notice.

⁵ Attachment 1 to Respondent’s Motion to Vacate Payment Due Notice.

reflects that Respondent received a critical rate of violations in Part 395”; (2) Respondent may challenge these findings only by filing a safety rating appeal under 49 CFR 385.15, not through a motion to vacate; and (3) Respondent, by signing the Settlement Agreement, admitted the violations alleged in the January 19, 2006, NOC and waived its right to challenge these violations and the reinstatement of the suspended amount of the civil penalty.

2. Decision

This case does not involve an attempt to adjudicate the violations alleged in the January 19, 2006 NOC. Respondent admitted these violations in the April 2006 Settlement Agreement and is not seeking to retract that admission. Rather, the key issue in this case is whether the Field Administrator may demand reinstatement of civil penalties suspended in that agreement based solely on the findings of the December 20, 2006, compliance review without further adjudication of the validity of these findings.⁶ I conclude that he may not.

As Respondent points out, Section 10 of the Settlement Agreement states that the Agreement becomes a Final Agency Order when executed by the Field Administrator. The process for seeking penalties for violations of Agency orders is governed by § 386.82 of the Agency’s Rules of Practice, which applies to violations of orders issued under § 386.22.⁷ Appendix A to Part 386, section III provides that the penalty for failing

⁶ Notwithstanding the Field Administrator’s exhaustion of administrative remedies argument, his January 3, 2007, letter demanded immediate payment of the suspended amount based solely on the findings of the compliance review without reference to any administrative remedies available to Respondent under 49 CFR 385.15.

⁷ Section 386.22(b) provides that settlement agreements become Final Agency Orders upon execution by the Field Administrator or his/her designee.

to comply with a Final Agency Order is automatic reinstatement of any penalty previously reduced or held in abeyance and restoration of the full amount assessed in the NOC less any payments previously made. Section 386.82(c) requires that “[c]laims for penalties provided in this section and in the appendix A to this part shall be made through the civil forfeiture proceedings contained in this part. The issues to be decided in such proceedings will be limited to whether violations of notices and orders occurred as claimed and the appropriate penalty for such violations”.

Therefore, Respondent correctly states that a civil forfeiture proceeding must be initiated under Part 386 before the Field Administrator can seek reinstatement of suspended civil penalties based on alleged violations of an agreement of settlement. Such proceedings are commenced by the issuance of an NOC pursuant to § 386.11, and the Field Administrator’s January 3, 2007, letter does not contain all the elements of a proper NOC, particularly the requirement that the respondent be apprised of the time, form and manner in which it may pay, contest or otherwise seek resolution of the claim.

The Field Administrator’s argument that Respondent may only challenge his demand for payment by filing a safety rating appeal under § 385.15 is thus inconsistent with § 386.82(c). Moreover, Section 5 of the Settlement Agreement conditioned suspension of 35% of the civil penalty upon Respondent not receiving any critical or acute violations in Part 395 during the 2-year period covered by the Agreement. Under the terms of the Agreement, therefore, the suspended penalty could be reinstated even if the number of violations discovered in the compliance review did not reach the threshold

necessary to establish a pattern of noncompliance with a critical violation.⁸ Because only patterns of noncompliance with critical violations are used to determine safety ratings, the Agreement would permit reinstatement of the penalty even when the safety rating may not be affected. In such cases, an appeal under § 385.15 would not be appropriate.⁹

In conclusion, the Field Administrator was required to serve Respondent with a Notice of Claim giving Respondent the opportunity to contest the violations found in the December 2006 compliance review before reinstating the suspended penalty. The January 3, 2007, letter from the Field Administrator demanding immediate payment did not comply with the requirements of 49 CFR Part 386 and any payment made in response to that letter shall be refunded to Respondent.¹⁰ According to the Field Administrator, Respondent paid the suspended penalty in full on February 20, 2007, four days after submitting its motion to vacate the payment due notice. Inasmuch as the payment due notice advised Respondent that it would be prohibited from operating in interstate commerce, and its registration suspended or revoked, if it did not pay by April 7, 2007,

⁸ A pattern of noncompliance is defined in Part 385, Appendix B. II. (g) as violations found in at least 10 percent of the documents reviewed. The December 2006 compliance review found sufficient violations to meet this standard.

⁹ See *In the Matter of CAPE Environmental Management, Inc.*, Docket No. FMCSA-2008-0322, Decision on Petition for Administrative Review under 49 CFR 385.15, (February 23, 2009).

¹⁰ This decision should not be interpreted as requiring a Part 386 proceeding to demand reinstatement of the full penalty based solely upon failure to pay the non-suspended portion of the penalty. Section 386.22(a)(vi) of the Rules of Practice envisions immediate payment of the original amount of the civil penalty upon failure to pay or to otherwise comply with the terms of the Agreement. Although failure to comply with the Agreement based on the results of a compliance review involves substantive issues which must first be determined under 49 CFR Part 386, a carrier's failure to pay does not involve issues which require resolution through an administrative proceeding.

this payment shall be considered to have been made in response to the payment due notice.

Although the Field Administrator issued an NOC on February 1, 2007, seeking a civil penalty of \$65,420 based on the violations found in the December 2006 compliance review, he chose not to include reinstatement of the penalty amount suspended by the settlement agreement as part of the proposed penalty.¹¹ Although the enforcement proceeding in Docket No. FMCSA-2007-28014 may ultimately result in the adjudication of the violations alleged in the December 2006 compliance review, it may not be used as a vehicle for reinstating the suspended penalty in the instant proceeding unless the Field Administrator amends the February 1, 2007, NOC to include reinstatement of this amount.

Therefore, *It Is Hereby Ordered That* Respondent's motion is granted. The Field Administrator shall refund \$3,783 to Respondent within 30 days of the service date of this Order.



Rose A. McMurray
Assistant Administrator
Federal Motor Carrier Safety Administration

4-3-09
Date

¹¹ Official notice is hereby taken of this NOC, which can be found in Docket No. FMCSA-2007-28014 as Exhibit A to the Field Administrator's Objections to Respondent's Request for Hearing.

CERTIFICATE OF SERVICE

This is to certify that on this 7th day of April, 2009, the undersigned mailed or delivered, as specified, the designated number of copies of the foregoing document to the persons listed below.

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